IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 276 of 1995.

Judgement reserved on: 30.5.2007

Date of decision: 3.7.2007.

Smt. Budhi Devi **…….Appellant**

Vs.

Nup Ram and others **…. Respondents.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant : **Mr. O.P.Sharma, Senior Advocate with Mr. K.R. Kashyap, Advocate.**

For the Respondents : **Mr. K.D. Sood, Advocate, for respondent No.1.**

Mr. Vinod Thakur, vice Mr. M.C. Mandhotra, Advocate for respondents No.6 to 8.

Kuldip Singh, Judge.

The defendant No.4 Smt. Budhi Devi is in appeal against judgment, decree dated 5.5.1995 passed by learned Additional District Judge, Kullu, District Kullu in Civil Appeal No.13 of 1994 confirming judgment, decree dated 31.3.1994 passed by learned Senior Sub Judge Lahaul-Spiti District exercising the powers of Sub Judge Ist Class, Kullu in Civil Suit No. 123/89. The parties are referred in the same manner as in the trial Court.

2. The facts of the case as emerge from the plaint are that Nup Ram son of Shukru plaintiff filed a suit for declaration that he is

---

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

owner in possession of land, one house, one Prachha more specifically detailed in the plaint and the mutation No.978 dated 3.6.1988 of Fhati Tandi whereby estate of Bholu Ram was mutated in the name of Dule Ram and Dolu defendants N.1 and 2 is illegal and not binding on the plaintiff, mutation No.1031 of Fhati Tandi allegedly partitioning the suit land interse defendants Dule Ram, Dolu,Fagni and Shukru defendants No.1,2,5 and 6 respectively is illegal and void. Khasra No.262 along with house and Prachha existing thereon is joint, plaintiff Nup Ram having 6/10 share,defendant No.5 Smt. Fagni 1/10 share, Sars Ram , Jit Ram,Tule Ram defendants No.7,8 and 9 respectively jointly having 3/10 share therein. Dule Ram, Dolu, Ugam Ram, Smt. Budhi Devi, Shukru and Smt. Man Dassi defendants No.1 to 4, 6 and 10 respectively have no concern whatsoever with the said property. The sale deed dated 12.5.1989 executed by Dule Ram, defendant No.1 in favour of Ugam Ram and Smt. Budhi Devi defendants No.3 and 4 is illegal. Mutation No.1044 attested on the basis of said sale deed is also wrong and illegal. In case the plaintiff is dispossessed from the suit land by defendants during the pendency of the suit or the plaintiff is not found in possession of the suit property then alternatively suit for possession.

3. The further facts are that Bholu Ram was original owner of land comprised in Khasra No.262 measuring 14 Bigha 18 Biswa having one house, one Prachha to the extent of 6/10 shrare. Bholu Ram was married to Smt. Maltu who was divorced by him and thereafter she married with one Paras Ram brother of Bholu Ram. One daughter Smt. Man Dassi defendant No.10 was married during

the life time of Bholu Ram with Delu defendant No.2. Bholu Ram apart from Smt. Man Dassi had no other issue.

4. Smt. Man Dassi defendant No.10 was married and there was none else to look after, maintain and render services to Bholu Ram, who was looked after and maintained by Smt. Kamlu mother of Nup Ram and plaintiff. Smt. Kamlu and plaintiff resided with Bholu Ram. In these circumstances out of his free will Bholu Ram executed Will dated 16.5.1978 in favour of Smt. Kamlu mother of plaintiff which was registered on the same date.

5. Bholu Ram died in May 1988 and on the basis of his Will dated 16.5.1978 his entire estate came to be owned and possessed exclusively by Smt. Kamlu who was married to Shukru father of plaintiff but their relations were strained. Shukru and Bholu Ram were real brothers. One year after the execution of the Will by Bholu Ram in favour of Smt. Kamlu she was divorced by her husband Shukru as he was very much annoyed with her. Smt. Kamlu died in June 1988 and on her death the entire property which was owned and possessed by her was inherited by the plaintiff as son and sole heir of Smt. Kamlu.

6. The Defendants No.1 and 2 got the mutation No.978 dated 3.6.1988 of inheritance of Bholu Ram deceased attested in their favour behind the back of Smt. Kamlu on the basis of bogus, fictitious and forged Will of Bholu Ram in favour of defendants No.1 and 2, who after the attestation of mutation inconnivance with defendants No.5 and 6 got mutation No.1031 attested whereby the suit land was allegedly partitioned. The defendants No.1,2 were not

the owners of suit property. The plaintiff is exclusive owner in possession of suit property. Dule Ram defendant No.1 on the basis of sale deed dated 12.5.1989 sold 4 Bighas 10 Biswas land in favour of defendants No.3 and 4. The sale deed dated 12.5.1989 is wrong and illegal. The defendants No.3 and 4 on the basis of sale deed also got attested mutation No.1044 in their favour which is also wrong and illegal. Shukru defendant No.6 transferred specific portion of Khasra No.262 in favour of defendants No.7,8 and 9 which is also wrong and illegal. On these grounds the plaintiff filed the suit.

7. The suit was contested by defendants No.1,2,5 and 10 by filing written statement in which preliminary objections of maintainability, valuation, cause of action have been taken. It has been alleged that Smt. Kamlu predeceased Bholu Ram and no Will was executed by Bholu Ram in her favour. On merits, it has been submitted that Bholu Ram had executed a registered will dated 24.11.1987 in favour of defendants No.1 and 2. The partition was effected bonafidely interse, the defendants and plaintiff has no right to challenge the same. The defendant No.1 had every right to sell the suit land in favour of defendants No.3 and 4. The plaintiff is not a co-sharer in the suit property.

8. The defendants No.3 and 4 have filed common written statements and took preliminary objections of locus standi, defendants No.3 and 4 are bona fide purchasers without notice of ownership of plaintiff, suit is not maintainable and the suit has not been properly valued. The will dated 16.5.1978 in favour of Smt.

Kamlu Devi was denied . On the contrary Will dated 24.11.1987 in favour of defendants No.1 & 2 was pleaded.

9. The defendants No.7 to 9 have filed separate written statement in which they have taken preliminary objections that they are the bona fide purchasers without notice of any defect, the plaintiff is estopped from challenging the exclusive ownership and possession of the defendants No.7 to 9 regarding suit property comprised in Khasra No.262/4 measuring 4-9-0 bighas. On merits, they have submitted that on the death of Bholu Ram his estate was inherited by defendants No.1 and 2 as per mutation No.978. The partition was effected amongst the owners vide mutation No.1031 is valid, after partition defendant No.6 became exclusive owner in possession of Khasra No.262/4 which was sold by him to defendants No.7 to 9.

10. The learned trial Court has held that Will dated 16.5.1978 Ex.PA was executed by Bholu Ram in favour of Smt. Kamlu and returned a specific finding that Ex.DW-3/A alleged Will dated 16.11.1987 is a forged document written by defendants No.1 & 2 and it does not confer any right, title or interest qua the suit land on defendants No.1 & 2, therefore, any transaction entered into by defendants No.1 & 2 in favour of other defendants is illegal and void. The defendant No.6 Shukru was joint owner in possession of the suit land to the extent of 3/10 share, therefore rights of the plaintiff qua the suit land are not affected. The defendant No.6 has sold only his share and defendants No.7 to 9 are not affected by Will Ex.PA. The trial Court ultimately decreed the suit on 31.3.1994. The

decision of the trial Court was assailed by way of two appeals i.e. Civil Appeal No.13/94 and Civil Appeal No.19/94 before the lower Appellate Court who dismissed both the appeals vide judgment dated 5.5.1995. The present appeal has arisen out of judgment, decree dated 5.5.1995 in Civil Appeal No.13 of 1994.

11. The appeal has been admitted on following substantial question of law:-

> ***Whether Ex.PA and Ex.DW-3/A have been misconstrued?***

12. I have heard the learned counsel for the parties and have also gone through the records. The learned counsel for the appellant has submitted that the two Courts below have misconstrued Will dated 16.5.1978, Ex.PA and another will dated 24.11.1987 Ex.DW-3/A. He has submitted that Bholu Ram had executed Will Ex.DW-3/Ain favour of defendants No.1 and 2 and he has not executed any Will Ex.PA in favour of Smt. Kamlu. The learned counsel for the plaintiff has supported the impugned judgment and decree.

Substantial question of Law

13. The execution of the will is a pure finding of fact based upon on appreciation of evidence. The two Courts below have concurrently held that Bholu Ram did not execute Will Ex.DW-3/A. Dule Ram defendant No.1 has appeared as DW-1 and has stated that deceased Bholu Ram has executed a registered Will mark-A, which is nothing but Ex.DW-3/A, according to him when the Will was written he along with Dhian Singh and Chander Balab Pardhan were present.

Dhian Singh and Chander Balab witnesses were brought by him from Banjar . Mansukh DW-3 is the scribe of the Will Ex.DW-3/A , who has stated that the Will was written by him at the instance of Bholu Ram in presence of Dhian Singh and Chander Balab. He has stated that the when the Will Ex.DW-3/A was written the Ex.PA was not shown to him. He has admitted that Will Ex.PA was written by his father Parmanand. DW-5 Dhian Singh has stated that he signed the Will Ex.DW-3/A since defendant No.1 came to him and said that one will has been written and he was required to sign the said Will as a witness. He has stated that thumb impression of Bholu Ram on the Will was already put. The Tehsildar did not read over and explain the Will. He has stated that Will Ex.DW-3/A was signed by him in good faith. DW-6 Chander Balab has also stated that he was called by defendant No.1 to put his signatures on the Will Ex.DW-3/A and DW-5 Dhian Singh was not present when he put his signatures. He has also stated that the Will Ex.DW-3/A was already written before he put his signatures. He denied the execution of the Will.

14. The Courts below after appreciation of evidence on record have come to the conclusion that Bholu Ram has executed Will Ex.PA dated 16.5.1978 in favour of Smt. Kamlu. The execution of the will has been proved by PW-2 Sita Ram marginal witness. He has stated that on 16.5.1978 deceased Bholu Ram executed Will Ex.PA in favour of Smt. Kamlu. The Will was written by Parmanand at the instance of deceased Bholu Ram in presence of Sharan Dass Nambardar. The deceased was in sound state of mind. The Will Ex.PA was presented before the Tehsildar and deceased Bholu Ram

admitted the same to be correct before Tehsildar. PW-4 Prem Chand, Superintendent has proved endorsement Ex.PA/1 on Ex.PA which was written by him and signed by Dalip Singh Sub Registrar, who has died.

15. The Courts below have considered the material on record and after due appreciation of evidence have rightly come to the conclusion that Bholu Ram had executed Will Ex.PA in favour of Smt. Kamlu mother of plaintiff and Ex.DW-3/A Will was not executed by Bholu Ram in favour of defendants No.1,2. This is pure finding of fact. The learned counsel for the appellant-defendant No.4 has failed to make out any case to show that the Courts below have misconstrued Ex.PA and Ex.DW-3/A. No interference is required. The substantial question of law is answered against the appellant.

16. The result of the above discussion is that the appeal is dismissed with costs.

(Kuldip Singh)
Judge.

July 3,2007
(sks)